Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	CCBPol 97-4
	)	CC Docket No. 96-98
Petition of MCI for	)	
Declaratory Ruling	)	
	)	

Reply Comments of LCI International Telecom Corp.

Anne K. Bingaman
Doug Kinkoph
LCI International, Inc.
8180 Greensboro Drive, Suite 800
McLean, Virginia 22102
(703) 610-4877

Eugene D. Cohen
Chad S. Campbell
Bailey Campbell PLC
649 North Second Avenue
Phoenix, Arizona 85003
(602) 716-9260

Introduction

The positions advanced by Southwestern Bell and the other RBOCs in opposition to MCI's declaratory petition regarding unbundled network elements and intellectual property issues are not new, and have been rejected by the Commission. Thus, the RBOCs advanced similar positions in the Commission's rule making proceeding to implement amended section 259 (requiring ILECs to make available "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to "qualifying carriers"). The Commission's rejection of the RBOCs positions in that proceeding and its placement of the burden to negotiate with third party vendors on ILECs rather than qualifying carriers should apply with equal force here. [See FCC Report and Order (CC Docket No. 96-237, Release No. FCC 97-36, Released February 7, 1997) at ¶¶ 68-70] Placing the burden of negotiation on the ILECs is the only practical way to curb the ILECs incentive to delay the onset of competition through unbundling of network elements by claiming problems where none in fact exist and the most efficient means to prevent discrimination in the costs that ILECs and CLECs will face for those elements.

Discussion

A. Placing the Burden of Negotiation on ILECs Will Not Interfere With Third Party Rights.

The RBOCs mistakenly suggest that the relief requested by MCI would be the equivalent of an order directed at third parties over which the Commission lacks authority or an improper confiscation of third party rights. [*See, e.g.*, Comments of Southwestern Bell, Pacific Bell and Nevada Bell at 16; Initial Comments of Ameritech at 2-3] As illustrated by the recent section 259

decision, however, the Commission need not direct its order to third parties to provide the relief in question:

> [W]e agree with AT&T and RTC that providing incumbent LECs may not evade their section 259 obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate—or allow—provision of certain types of information to qualifying carriers. Therefore, we decide that the providing incumbent LEC must determine an appropriate way to negotiate and implement section 259 agreements with qualifying carriers, i.e., without imposing inappropriate burdens on qualifying carriers. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly. *We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs. We merely require the providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section 259.*

[FCC Report and Order (CC Docket No. 96-237, Release No. FCC97-36, released February 7, 1997) at ¶70 (emphasis supplied)] Placing the burden of negotiating to remove third party claims or objections to the unbundling of network elements on ILECs (to the extent such claims or objections are legitimate) is an act directed at the ILECs, not at third parties.

B. ILECs Are Best Suited to Negotiate with Third Parties.

Several of the RBOCs contend that MCI and AT&T occupy superior bargaining positions against third parties by virtue of their size and geographic scope. Whatever the merit of that argument with respect to those companies, it does not follow that all or even most CLECs have comparable bargaining strength as against third party vendors. LCI, for example, is nowhere near the size of AT&T, MCI or the RBOCs, and could not assert the same influence in negotiations as those companies can assert.

Moreover, the assertion of CLEC bargaining strength as against third parties is belied by the third party vendors' own comments to the Commission in opposition to MCI's petition. At pages 3-5 of their brief, the Ad Hoc Coalition of Telecommunications Manufacturing Companies urges the Commission not to impose a requirement on ILECs to negotiate with third party vendors to remove claimed barriers to providing access to technology imbedded in unbundled network elements. There is no reason to suspect that the vendors are lobbying the Commission against their own interest and every reason to believe that they view ILECs as the stronger set of bargaining opponents. A rational, self-interested vendor would prefer to negotiate with the weaker of two parties because that negotiating alignment maximizes the price to the vendor, all else being equal.

An important part of the ILECs' superior bargaining strength against third parties derives from their exclusive access to the contracts and agreements on which they base their asserted concerns about intellectual property claims. Understanding the actual contract language upon which a claim is based generally is important when negotiating to eliminate the claim and, where the basis for the claim is doubtful, such access is indispensable. Significantly, neither the commenting RBOCs nor the commenting manufactures elected to disclose (or to obtain permission to disclose) the actual agreements on which they assert the potential for claims by third parties. Given that most of the vendor contracts in question were entered into before the enactment of the 1996 Telecom Act or the issuance of the Commission's August 8 Order, the agreements could not have been drafted expressly to address the issue of unbundled access to network elements. To the extent that vendor claims for unbundled access exist at all, they are tenuous at best. The burden of negotiating to eliminate such claims should fall on the group with the most information about the basis of the claims.

Contrary to the assertion of some RBOCs, placing the burden of negotiating with third parties on ILECs will not be the equivalent of requiring them to act as agents or fiduciaries for CLECs. An ILEC claiming a third party impediment to the provision of access to an unbundled network element need only ensure that the ILEC may provide access to the element to a requesting CLEC on terms that are at least equal to the terms under which the ILEC has access to the element itself. Once that is accomplished, the burden of negotiation would be discharged.

C. Placing the Burden of Negotiation on the ILECs Is the Sound Policy Choice.

Congress enacted the '96 Act for the express purpose of opening historically monopolized local exchange markets to competitive forces. [First Report and Order, CC Docket 96-98, released August 8, 1996 at ¶1] Requiring ILECs to unbundle their networks and to make individual network elements available to competitors on the basis of the actual cost of providing the element is a centerpiece of the competitive structure envisioned by Congress. See 42 U.S.C. §§251(c), 252(d)(1)(A). For unbundled elements to promote competition, ILECs and CLECs must face nondiscriminatory costs for the same elements. Unless ILECs are required to negotiate to assure that they may provide access to unbundled elements on terms equivalent to the terms enjoyed by themselves, price discrimination is unavoidable. Once a third party's technology has been selected by the ILEC and imbedded in the network element, the third party gains leverage that it did not enjoy while competing to become the ILEC's first choice. [*See* Affidavit of Roger Milgrim, at 15 (submitted by Southwestern Bell) ("the licensing arrangement that is achieved [by the ILEC/licensee] reflects the primordial fact that . . . the licensee can elect to refrain from using the licensor's intellectual property through the use of functionally equivalent matter")] With the

technology selection already made, the CLEC must accept the terms offered by the third party if it is to have access to the element at all.

D. Placing the Burden of Negotiation on ILECs Will Reduce the Volume of Third Party Claims That Arise from Unbundled Access.

In many respects, the RBOCs' comments are more noteworthy for what they omit to say than for what they assert. That is particularly true of their assertion that providing unbundled access to network elements will present a widespread problem for ILECs or third parties.

The RBOCs concede outright that some vendor contracts do not restrict the use of imbedded technology at all. [Comments of Southwestern Bell at 9] As for the licenses that include use restrictions, the RBOCs have identified none with a prohibition against access by CLECs to imbedded technology in an unbundled network element. The most that any of the RBOCs apparently can say is that their agreements with third parties "generally do not expressly authorize other carriers to use th[e] software and equipment to provide services of their own," or that many of the vendor licenses "do not permit the sublicensing of intellectual property rights, or the granting of access to the licensors' software, to CLECs." [Comments of Southwestern Bell at 8, 16]

The RBOCs' implicit (though unstated) assertion is that, by providing access to an unbundled network element, an ILEC effectively sublicenses to the CLEC any software imbedded in the element. That assertion is unsupported by anything in the record and should be rejected. According to Southwestern Bell's affiant, Mr. Milgrim, a fair reading of the restrictions on sublicensing and use of third party software in RBOC licenses is that use of the embedded software is confined to the operation of "the [RBOCs'] own business." [Milgrim Affidavit at §19] But the provision of

unbundled network elements is inside not outside the RBOCs' business and is a use of the element by the RBOC not a complete surrender of use to the CLEC. That explains why, under the pricing provisions of section 252(d)(1), the RBOC is permitted to include a reasonable profit in the rate set for the access to unbundled network elements provided to CLECs.

At present, the RBOCs have every incentive to interpret their licensing agreements with third parties to find excuses for delaying access to unbundled elements and forestalling the competitive environment that such access will generate. The Commission can eliminate or diminish that incentive by placing on the ILECs the burden to eliminate the problems they now claim to have identified.

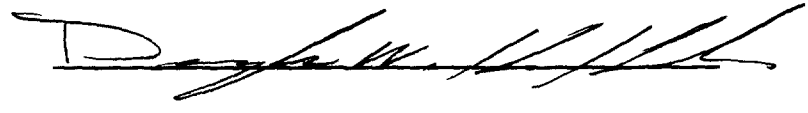
E. The Issue Is Properly Raised.

Finally, RBOC assertions to the contrary notwithstanding, MCI's petition is procedurally proper and well supported. Declaratory rulings to remove an uncertainty are expressly authorized by the Commission's own regulations. 47 C.F.R. § 1.2. Uncertainty was created by Southwestern Bell's assertion (repeated in its comment brief here) that dozens and dozens of license extensions must be negotiated before it will permit access to unbundled network elements. That other RBOCs share Southwestern Bell's position is clear from the comments submitted to the Commission. All carriers and the state commissions will benefit from the adoption of national standards for addressing this issue. To permit state commissions to adopt varying and potentially competing approaches to such an issue would only promote delay and foster greater uncertainty. In such circumstances, the Commission has announced that it will exercise its rule-making authority provided by Congress. [*See First Report and Order*, CC Docket 96-98 (released August 8, 1996) at §125 ("The Commission also

stands ready to provide guidance to states and other parties regarding the statute and our rules. In addition to the informal consultations that we hope to continue with state commissions, they or other parties may at any time seek a declaratory ruling where necessary to remove uncertainty or eliminate a controversy. Because section 251 is critical to the development of competitive local markets, we intend to act expeditiously on such requests for declaratory rulings.")]

May 6, 1997

Respectfully submitted,



Eugene D. Cohen
Chad S. Campbell
Bailey Campbell PLC
649 North Second Avenue
Phoenix, Arizona 85003

Anne K. Bingaman
Doug Kinkoph
LCI International Telecom Corp.
8180 Greensboro Drive, Suite 800
McLean, Virginia 22102
(703) 610-4877

Certificate of Service

I, Patricio E. Garavito, certify that copies of the foregoing Comments of LCI International Telecom Corp. were sent by first class mail (or hand delivery, indicated by the *) to the following persons on May 6, 1997.

John Morabito
Federal Communications Commission
2025 M Street, N.W., Room 6010
Washington, D.C. 20554

*Richard Welch
Chief, Policy and Program Planning Division
Federal Communications Commission
1919 M Street, N.W. Room 544
Washington, D.C. 20554

*Janice Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. Room 544
Washington, D.C. 20554

Adrian Wright
Federal Communications Commission
2000 L Street, N.W. Room 812
Washington, D.C. 20554

*Richard Metzger
Federal Communications Commission
1919 M Street, N.W. Room 500
Washington, D.C. 20554

*James Schlichting
Chief, Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W. Room 518
Washington, D.C. 20554

*ITS, Inc.
2100 M Street, N.W., Suite 140
Washington, D.C. 20037